IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 899 OF 2004

Shri Ganpat Shankar Thokal & Anr. .. Appellants
V/s.
Shri Jagannath Zunga Bhangare & Ors. .. Respondents

Mr. N.V. Bandiwadekar for the Appellants
Mr. S.G. Karandikar for the Respondent No. 1.

CORAM : ABHAY S. OKA, J.
DATED : 20TH APRIL, 2005

P.C.:-

1. Heard Advocates for the parties. Second Appeal is filed by the Original Defendant Nos. 2 and 3. Decree passed by the Trial Court is of partition and separate possession. The Original Defendant No. 1 Kalu and father of the Original Plaintiff Zunga were the real brothers. The Appellants herein are purchasers of the property through the original Defendant No. 1 Kalu. Both the Courts have held in favour of the Original Plaintiff.

2. Shri Bandiwadekar submitted that the father of the original Plaintiff had filed Suit against the Original Defendant No. 1 for partition and declaration. The said Suit was disposed of as abated and therefore, fresh Suit by his son was not maintainable. Shri Bandiwadekar further submitted that the predecessor of the Appellants had 1/2 share in the property and therefore, the entire sale transaction in favour of the Appellants could not have been declared to be voidable and illegal. Shri Bandiwadekar submitted that there was a clear admission

given by the Original Plaintiff of the prior partition. He lastly submitted that Courts below have relied upon the Written Statement of the Original Defendant No. 10, who is the daughter of the deceased Defendant No. 1. He pointed out that the Defendant No. 10 could not have taken stand, which was contrary to the plea taken by the Defendant No. 1 in his pleading.

3. So far as the first submission is concerned, it is to be borne in mind that Suit filed by the Respondent No. 1 is for general partition, seeking partition of his separate share. Perusal of the judgment of the First Appellate Court shows that plea of the bar created by order passed in the Suit filed by the father of the Respondent No. 1 was not agitated at the time of hearing of the Appeal. It is not the case of the Appellant that the said plea was agitated and the same is not considered by the First Appellate Court. Therefore, the said contention cannot be allowed to be urged in this Second Appeal.

4. In sofar as the second submission is concerned, Shri Karandikar, the learned counsel for the Respondent No. 1 brought to my notice the finding recorded by the Trial Court that Original Defendant No. 1 was a tribal and therefore, transfer effected by him without permission of the competent authority in favour of the Appellant was illegal. Shri Bandiwadekar for the Appellant states that no such plea was taken in the Plaint.

5. Perusal of the judgment of the Trial Court shows that the Original Plaintiff lead evidence contending that his family belongs to a tribal community. It is clear that the evidence was led to show that the Original Plaintiff and the Defendant No. 1 are tribals. On the basis of the said evidence, the Trial Court has recorded a finding that the transfer by the Original Defendant No. 1 was in contravention of law. The said finding has been confirmed by the Appellate Court. No fault can be found with the said finding.

6. As regards the pleas of earlier partition, it has been considered by the Appellate Court. The Appellate Court has relied upon a mutation entry based on application filed by the deceased Defendant No. 1 for entering the name of the father of the Plaintiff in the revenue records. The Appellate Court has considered the evidence by the Appellant No. 1 (Original Defendant No. 2). After considering the oral and documentary evidence on record, the Appellate Court has come to the conclusion that earlier partition is not established. The burden to establish that the property purchased by the Appellants was self-acquired property of the Defendant No. 1 was on the Appellants. The findings of the Courts are that they have not discharged the burden. The said findings are recorded after considering the oral and documentary evidence on record. The stand

taken by the Original Defendant No. 10 in Written Statement can not have any significance.

7. No substantial question of law arises. In view of the findings of fact recorded by the Courts below, there is no merit in the Second Appeal. Second Appeal dismissed with no order as to costs.

(JUDGE)